In the case of *In re Isaac. Ex parte Isaac*, (1885) 2 Morr. 258, where the debtor let judgment go by default and then got that set aside and leave to defend on bringing £43 into Court which he did not do, it was held that the debtor could and ought to have set off in the action and that as he had failed to do so he was not within the section. [Bankruptcy Act, 1883, Sect. 4 (1)(g)].

In that case Cave, J., raised the question as to why the debtor could not avail himself of the set off in the action and it was argued that if unconditional liberty to defend had been given to him the debtor could have done so but liberty was only given on condition of bringing £43 into Court. On this argument the learned Judge expressed the view that "that is not what is meant by the words he could not set up! It means when the claim was not then due or something of that kind. There is nothing to show that the condition imposed was not rightly so. There was no appeal against it."

In the matter under consideration there was an appeal and it was held that the condition was rightly imposed.

The interpretation given by Cave, J., to the words "he could not set up" would appear to have been followed in *Re a Debtor*, (1914) 3 K.B. 726 where a debtor after service of a bankruptcy notice on him got an assignment of a debt due from the judgment creditor to a firm of which the debtor was a member and applied to set aside the bankruptcy notice on the ground that he had a counterclaim which he could not set up in the action in which judgment was obtained, it was held that even if the debtor could have obtained the assignment in time to set up the counterclaim in the action, he could not have set it up as matters then stood, and that the notice must be set aside.

I am of opinion in this case that the debtor has not brought himself within the section and that the proceedings in bankruptcy ought not to be stopped.

The motion must be dismissed with costs.

Motion dismissed.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J.

July 18, 1933.

K. A. SAIYO APPOOHAMY ..... **Appellant.**

vs.

K. A. ALBERT ..... **Respondent.**

[SELANGOR MAGISTRATE'S CIVIL APPEAL No. 24 of 1933]

Civil Procedure Code, 1918, section 328 (i) —Judgment debtor summons—Committal order —Absence of judgment debtor.

A committal order under section 328 (i) of the Civil Procedure Code, should not be made in the absence of the judgment debtor, and the Court should not accept the statement of a judgment-debtor's solicitor as sufficient to warrant such an order.

***Ram Dutt* v. *Mallik* (1931-1932) F.M.S.L.R. 260, distinguished.**

S. C. MacIntyre for the appellant.

L. R. Chandran for the respondent.

Cur. Adv. Vult.

TERRELL, AG. C.J.—On a judgment-debtor summons filed in pursuance of a decree made in Kuala Lumpur Civil Suit No. 360/32, the following is a note of the order made:—

> "The full amount of the claim is to be settled by 21-10-32. Stay of execution will be granted if a suit is filed. In default of payment civil imprisonment until payment of sum due."

At the hearing of the summons the judgment-debtor, the present appellant, was not present but through his counsel, Mr. Lahiri, stated that he was able to pay but was filing a cross suit against the plaintiff-respondent on the present appeal.

The learned Magistrate in his grounds of judgment expressed a doubt as to whether the proceedings were in order, as the judgment-debtor was not himself examined on oath as contemplated by section 327 (i) of the Civil Procedure Code. As to this section 327 (iv) shows that the judgment-debtor need not always be present, and in the case of *Ram Dutt* v. *Mallik (supra)* Mudie, J. held that no further investigation was necessary if the judgment-debtor appeared by counsel and consented to an order. In that case, however, the order made was merely for payment, and it was only on failure to pay that the Court was moved to commit the judgment-debtor.

I am quite satisfied that an order to commit the Judgment-debtor ought not to be made except in his presence. This is not inconsistent with the provisions of section 328 (ii), which provides that on an order for payment by instalments, an order may also be made to commit the judgment-debtor for failure to pay any instalment, because in view of the proviso at the end of the sub-section, no judgment-debtor shall be imprisoned upon such order until he shall have had an opportunity of showing cause: in other words a second application, which should be served personally, is necessary.

The Court of course has power to order that the debtor be arrested and brought before it under section 327 (iv), but this is a very different thing to the civil imprisonment contemplated by sections 328 (i) and 328 (ii).

If then the order made by the learned Magistrate was under section 328 (ii), there would be no objection on the ground that the judgment-debtor was not present, as a further application would be necessary before he could be imprisoned. To my mind, however, the final words of the order make it clear that it was made under section 328 (i), i.e. it is an order for imprisonment which is merely suspended for one week. That being the case, I think that no such order should have been made in the absence of the judgment-debtor, and that the Court should not accept a statement of a man's solicitor as sufficient to warrant an order of that kind.

I also think that the fact that the term of imprisonment is not specified is fatal. The Magistrate only had power to order imprisonment

for six weeks. The words 'until payment of the sum due' appearing in section 328 (i) contemplate payment within such period. As the order stands the judgment-debtor was clearly liable for imprisonment for an indefinite term.

On both grounds therefore, I think the appeal must be allowed and the order appealed from set aside.

As regards costs, the appellant did not comply strictly with the terms of section 547 (i) in that the memorandum of appeal was not accompanied by a copy of the decree. In fact the appellant adopted the highly irregular procedure of writing personally to the Acting Chief Justice. In the circumstances the appeal will be allowed without costs.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

July 27, 1933.

CHOI WAI YING.....Plaintiff

vs.

CHEONG WENG CHAN
CHEONG YOKE CHOY
CHEAH WAI YIN
KOK AH LING } .....Defendants.

[SELANGOR CIVIL SUIT No. 570 of 1932]

Courts Enactment 1918, section 49—Jurisdiction of Supreme Court—Suit for restitution of conjugal rights—Husband and wife—Tort—Action by wife for loss of husband's consortium.

In the Federated Malay States the Supreme Court may or may not have had original jurisdiction under section 49(i) of the Courts Enactment, 1918, to entertain a suit for restitution of conjugal rights among non-Christians, but if it had, such jurisdiction has been effectually taken away by the passing of the Divorce Enactment, 1928, and the repeal of the Secretary for Chinese Affairs Enactment, 1899, and the Perak Order in Council (Recognition of Chinese Laws) 1893.

For either spouse to leave the *consortium* of the other is a matrimonial offence and the Courts of the Federated Malay States cannot take cognizance of a matrimonial offence among Chinese.

Even if English Common Law principles were applicable, a wife who leaves her husband on account of the treatment received by her from her mother-in-law, has no right of action against her mother-in-law for the loss of her husband's *consortium*, because that loss was due to the wife's own act in voluntarily leaving her husband.

W. G. W. Hastings and *the Hon. Mr. S. Veerasamy* for the plaintiff.

Roland Braddell and *E. D. Shearn* for the defendants.

Cur. Ad. Vult.

TERRELL, ACTING C. J.—The plaintiff in this case was born in Canton of Chinese parents domiciled in Canton. On the 21st of November 1929, while still an infant, she contracted a marriage with the first defendant who was domiciled in the Federated Malay States. The marriage took place in Hong Kong according to the ancient Chinese ceremonies. After residing for two months in Hong Kong, the plaintiff, the first defendant, and the first defendant's parents, the second and third defendants came to Kuala Lumpur, and the plaintiff lived with her husband in the second defendant's house at 170 Pudu Road, Kuala Lumpur. The second defendant appears to have had five secondary wives, three of whom besides the third defendant were still living in the house at 170 Pudu Road when the plaintiff arrived from China. Accordingly, she entered an establishment where there were four mothers-in-law. The first defendant is the second defendant's only son.

On the 18th of August 1930, the plaintiff left the house, 170 Pudu Road, and went to her mother who was staying in Kuala Lumpur. She alleges that she was compelled to take this step owing to the harsh treatment she received, in particular, from the third defendant. After negotiations carried on by Mr. Veerasamy on the plaintiff's behalf, and through the good offices of Mr. San Ah Wing and Mr. Liew Weng Chee who interested themselves in the matter, the second defendant provided a house for the plaintiff at 9D Bukit Lintang Lane, Kuala Lumpur together with an allowance of $200 per month.

After she left the house in Pudu Road, the first defendant never saw the plaintiff again. She alleges that he was too frightened of his mother to attempt to do so. So matters continued until February 1932, when the first defendant contracted a marriage with the fourth defendant. On the 21st of November 1932 the plaint in this suit was filed.

As has been pointed out by counsel for the defence, the plaint really contains four different claims, which may be summarised as follows.

(1) against her husband the first defendant an order for restitution of conjugal rights;

(2) against the second and third defendants, damages for deprivation of her husband's *consortium*;

(3) against the first, second and third defendants, specific performance of an agreement alleged to have been made prior to the marriage, and providing for:—

  (a) that the plaintiff should be the first defendant's only wife;

  (b) that the second defendant should invest in the name of the plaintiff the sum of $300,000 in house property in Kuala Lumpur, as soon as they arrived there after the marriage;

  (c) that the plaintiff be allowed to visit her relatives in Hong Kong once in two years; and

  (d) that the plaintiff and her husband should be provided with a separate house to live in if the latter required it;

and alternatively against the second defendant damages for breach of the said agreement;

(4) a declaration that the marriage between the first and fourth defendants was void.

In view of the decision of the Court of Appeal in the case of *Geok Inn* v. *Yap Tai Chee*, 1 F. M. S. L. R. 51 plaintiff's counsel admitted